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No. 783

Supreme Court of the United States

October Term, 1957

LEONARD D. SPEED, JOSEPH SPAGNA, and JOHNNY HERNDON,

Petitioners,

—vs.—

THE CITY OF TALLAHASSEE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA

PETITIONERS' REPLY BRIEF

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I.

The judgment of the Circuit Court was not reviewable by certiorari in the Florida courts.

Respondent claims that this Court is without jurisdiction under Title 28, United States Code, §1257(3) to review the judgment of the Circuit Court of the Second Judicial Circuit of Florida since, says respondent, its judgment could have been reviewed by the District Court of Appeal and by the Supreme Court of Florida and is, therefore, not a final judgment.

Respondent concedes that no further appeal was possible under Florida law in this case since by both the Constitution

of Florida, Article V, §6 (1956)[1] and the laws of Florida, Florida Statutes Annotated, §26.53, the Circuit Court has final appellate jurisdiction. Cf. *Curry U-Drive It* v. *Ross*, 89 So. 2d 796 (1956); Cf. *American National Bank of Jacksonville* v. *Marks*, 45 So. 2d 336 (1950); *Malone* v. *City of Quincy*, 66 Fla. 52 (1913). However, respondent contends that petitioners could have secured a review of their claimed denial of rights secured by the Federal Constitution via common law writ of certiorari[2] issuing from the District Court of Appeal and the Supreme Court of Florida.

In Florida, it has always been the rule that review upon common law writ of certiorari to a lower court of record is limited to two questions only: (1) whether the inferior court exceeded its jurisdiction and (2) whether the inferior court followed the proper procedure.

Certiorari is not available in Florida to review an erroneous decision.

The Supreme Court of Florida, in 1950, in *American National Bank of Jacksonville* v. *Marks*, *supra*, reiterated, for the express benefit of the Florida bar, this limited scope of review which is available by common law certiorari. The Supreme Court of Florida has adhered to these limitations. *Wilson* v. *McCoy Mfg. Co.*, 69 So. 2d 659 (1954); *Neivert* v. *Evans*, 82 So. 2d 599, 600 (1955); *Tropical Park* v. *Ratcliff*, 97 So. 2d 169, 174 (1957).

Petitioners challenge neither the jurisdiction of the trial or appellate court in this case nor the procedure adopted by either.

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[1] Circuit courts had final appellate jurisdiction in such cases under the old constitution. Florida Constitution (1885) Article V, §11.

[2] There is no statutory certiorari applicable to appeals from municipal courts to circuit courts as in the case of appeals from civil courts of record to the circuit courts as provided by Florida Statutes Annotated §33.12.

In the cases cited by respondent, in which review of the validity of city ordinances was obtained in the Supreme Court of Florida upon common law certiorari, the Court specifically referred to the limited scope of review on common law certiorari in Florida which was reiterated by that Court in the *American National Bank* case, *supra*, and it is also clear that in each of these cases the court considered the petitioners' challenge to the jurisdiction of the municipal court involved. *Malone* v. *City of Quincy*, 66 Fla. 52, 62 So. 922 (1913); *Hunt* v. *City of Jacksonville*, 34 Fla. 504, 16 So. 398 (1894); *Mernaugh* v. *City of Orlando*, 41 Fla. 433, 27 So. 34 (1899).

In the *Hunt* case, which was the first one decided, the court in its opinion specifically referred to the limited scope of the review available upon certiorari (at 508) and specifically pointed out that petitioner, who had been convicted of violating a city ordinance, sought certiorari upon a challenge to the jurisdiction of the municipal court to try him for the offense (at 505). His claim was that the offense charged had been made an indictable offense by state law entitling him to a jury trial which the municipal court could not give because limited to trials without juries. In this case, however, the Court found no lack of jurisdiction or irregularity of procedure.

In the *Mernaugh* case, which followed, the Court again pointed out the limited scope of review (at 442) and again specifically pointed out that petitioner sought certiorari upon a challenge to the jurisdiction of the municipal court on the ground that since the City was without power under state law to enact an ordinance prohibiting the sale of liquor which he had been convicted of violating, its court was without jurisdiction to enforce same (at 436). The Court agreed with petitioner and held that the City was without authority to pass the ordinance and, therefore, its court was without jurisdiction to enforce it.

In the *Malone* case, a similar challenge was made to the power of the City of Quincy to enact the ordinance which petitioner had been convicted of violating and the Court similarly held that the City being without power to pass the ordinance, its court was without jurisdiction to enforce same. Although there is no specific reference by the Court in its opinion in the *Malone* case to a challenge to the jurisdiction of the municipal court by petitioner, it should be noted that in its opinion the Court cites and relies on the *Hunt* case when it again specifically refers to the limited scope of review upon common law certiorari (at 56). It is thus clear that in the *Malone* case the Florida Supreme Court was also proceeding upon the theory that petitioner was challenging the jurisdiction of the municipal court to try him for the offense.

Here petitioners neither challenge the power of the City of Tallahassee to enact an ordinance which purports to regulate the seating of passengers on local buses nor the power of its court to enforce a regulatory ordinance on this subject. The cases cited by respondent are, therefore, not apposite here.

II.

The judgments of the Municipal Court and Circuit Court rest on a denial of petitioners' claim of violation of rights secured by the due process and equal protection clauses of the Fourteenth Amendment.

As the transcript of the proceedings in the trial court discloses, at the close of the respondent's case, petitioners moved for a directed verdict on the ground that the ordinance violates rights secured by the State Constitution and by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution (T. 62).

The argument of petitioners' counsel and the cases cited by him show conclusively, however, that his reliance was upon rights secured by the Federal Constitution and not by the State Constitution (T. 62-69). Consequently, when the Municipal Court, in denying the motion, ruled that the ordinance was clothed with a presumption of constitutionality and that nothing had been presented by way of testimony to overcome this presumption, it is clear that the court was invoking this familiar rule with respect to the particular constitutional attack made upon the ordinance, which, as the record shows, was limited solely to an attack on federal constitutional grounds. And where, as here, the record clearly spells out that the sole attack upon the ordinance was on federal grounds, all doubt is precluded. *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957).

When petitioners appealed to the Circuit Court, they assigned as grounds for appeal, among others, the trial court's refusal to grant their motion for directed verdict. The Circuit Court had before it the transcript of the proceedings in the trial court which showed that petitioners' only attack upon the ordinance was on federal constitutional grounds. An examination of the briefs submitted by both petitioners and respondent in the Circuit Court shows that neither argument was based on state constitutional grounds, but wholly on federal constitutional grounds. Consequently, there can be no doubt that when the Circuit Court ruled, in its judgment affirming the trial court, that no denial of constitutional rights had been made to appear, it was referring to the Federal and not the State Constitution. The same is true of that court's order denying petitioners' motion for review of judgment on appeal when it denied same on the ground that it had duly

considered each ground for appeal when the case was before it on appeal.

Respectfully submitted,

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Certificate of Service

This is to certify that on the 12 day of March 1958 I served a copy of Petitioners' Supplemental Brief in the above-entitled case upon Leo Foster, counsel for respondent, by mailing a copy of same to him at P. O. Box 669, Tallahassee, Florida, via United States Air Mail.

CONSTANCE BAKER MOTLEY
Attorney for Petitioners